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No. 84-1657

In the Supreme Court

OF THE

United States

OCTOBER TERM 1984

MORTON P. MACLEOD,
Petitioner,

VS.

COUNTY OF SANTA CLARA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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THE NINTH CIRCUIT'S RULE OF DECISION IN THIS CASE IS NOT CONSISTENT WITH PENN CENTRAL

Petitioner's claim, unlike those in Goldblatt v. Hempstead, 369 U.S. 594 (1962), and Mugler v. Kansas, 123 U.S. 623 (1887), is not based upon a complete prohibition of a single use, the most beneficial use or even a diminition of value (cert. pet.

p. 10). Petitioner does not, therefore, seek to segment the property for determination of his taking claim. Timber harvesting was the only use anywhere on the property capable of generating a net income over and above the incremental expense of operation (App. B, pp. 29-30). It is irrelevant that timber harvesting could occur on only the timbered portions of the property because no permitted use of the balance of the property was economically gainful (App. B, pp. 19-20, 29).

Denial of the right to develop the property in Penn Central was upheld not because the owner sought development of only the air space over the Terminal but because the property as a whole retained a presently available gainful use (Penn Central Transp. Co. v. New York City 438 U.S. 104, 138 n. 36 (1978)). That is not the case here.

PETITIONER'S FORCED SALE OF THE PROPERTY WAS NOT AN ECONOMICALLY VIABLE USE AND MERE MARKETABILITY OF PROPERTY AFFORDS NO PROTECTION AGAINST OVER-REGULATION.

Petitioner lost money owning the ranches because the "ownership and operation costs" exceeded the appreciation (App. B, p. 27). Hence, sale of the property was no more economically gainful to petitioner than cattle operations were (id., p. 29); sale of the property afforded no substitute economically viable use but was simply the means of putting an end to petitioner's losses[1].

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1 The sale price for all three ranches ($7.2 million) is beside the point because the "property" for Fifth Amendment purposes was found to be only the Castro Valley and Escondido ranches (App. B, p. 37); these ranches were less valuable than petitioner's third ranch, the Bloomfield ranch which was not part of the property but was part of the sale. The Bloomfield ranch represented "a disproportionate share of the ultimate purchase price paid by [the buyer]" (App. B, pp. 44-45).

If government can, without compensation, prevent all available present uses which are gainful then there is no check on regulation by virtue of the Just Compensation clause and people without independent means to sustain a money-losing property are driven from ownership. This jettisons any protection from the Just Compensation clause against exercises of the police power which go "too far" (Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

Respectfully submitted,

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